Office-Supreme Court, U.
FILED
MAY 29 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1658

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT A. JACOBS AND
MIDLAND INSURANCE COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in denying petitioners' discovery motions in a bond forfeiture proceeding on the ground that the requested information was privileged.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) and the district court's orders (Pet. App. 4-8, 9) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1980. A petition for rehearing was denied on February 5, 1981. The petition for a writ of certiorari was filed on April 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners gave a bond of $30,000 on behalf of Salvatore Annunziato, a criminal defendant in the United States Dis-

trict Court for the District of Connecticut.[1] On July 9, 1979, Annunziato failed to appear at a hearing ordered by the court, and the court issued a bench warrant for his arrest (I Tr. 13).[2] Nine months later, following a fruitless grand jury inquiry into Annunziato's disappearance, the government moved that his bond be forfeited and that a default judgment be entered (Pet. App. 13-15). See Fed. R. Crim. P. 46(e).

1. Petitioners defended by claiming that Annunziato had been killed by organized crime figures before July 9, 1979, making it impossible for him to appear as required. Petitioners filed extensive requests for discovery (Pet. App. 16-29), seeking, among other things, information in the government's possession that would tend to establish that Annunziato's life had been threatened or that he was dead (see, *e.g.*, *id.* at 19, 25). The government opposed petitioners' discovery requests (*id.* at 30-31) but agreed to submit its files to the district court for an in camera review (II Tr. 34).

The district court, after examining the documents in question, found that "[t]he information contained in the F.B.I. files relative to the whereabouts of Mr. Annunziato, specifically the speculation that he is deceased, was obtained by the F.B.I. from informant sources developed during the course of a criminal investigation" (Pet. App. 6). Consequently, the court held, the informant's privilege described in *Roviaro* v. *United States*, 353 U.S. 53 (1957), applied to petitioners' discovery requests (Pet. App. 6). *Roviaro* required that petitioners' interest in obtaining the information be balanced against the government's interest

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[1]Annunziato was indicted for aiding and abetting the unlawful appropriation of union funds and conspiracy unlawfully to appropriate union funds, violations of 29 U.S.C. 501(c) and 18 U.S.C. 371 (Pet. 1).

[2]"I Tr." refers to the transcript of the hearing on July 9, 1979. "II Tr." refers to the transcript of the April 1, 1980, hearing. "III Tr." refers to the transcript of the May 30, 1980, hearing.

in protecting the identities of its informants (*id.* at 7). The court recognized that *Roviaro* involved a criminal defendant's efforts to obtain information from the government, and it suggested that petitioners' stake in the case was less weighty than that of most criminal defendants (*ibid.*). Moreover, the court said, the information petitioners sought was only "equivocal" (*ibid.*) and was not likely to be of substantial help to them; the court found that there was "no information" in the government's files "which establishes that Mr. Annunziato was dead on or before July 9, 1979" and that the information that was in the files about Annunziato's possible death "can at best be characterized as speculative uncorroborated multiple hearsay which is also contradictory in nature" (*id.* at 5-6). Since the disclosure of this information would be "likely to lead to the identity of the [government's] source" (*id.* at 7), the court held that petitioners' interest did not outweigh the government's, and that petitioners were not entitled to the information they sought.

2. The court heard conflicting evidence on the merits of petitioners' impossibility defense. A former government attorney testified that in late May of 1979 he had learned from an FBI agent that a source, whom the attorney described as "unreliable," said that "there was a contract on the life of Mr. Annunziato" (III Tr. 14-15, 20). The government attorney told Annunziato's attorney of the threat and offered Annunziato federal protection, but Annunziato rejected the offer (*id.* at 14-16). Annunziato's wife testified that she last saw him on June 19, 1979, but that she was subsequently given money, on one occasion, by a person who had given her money during Annunziato's prior incarcerations (*id.* at 6-8, 11, 36-37). On June 27, 1979, she notified the local police that Annunziato was missing, and they notified the FBI (*id.* at 9-10; I Tr. 8). Another local police officer who investigated Annunziato's disappearance testified that it was his "opinion" that Annunziato "met his

demise at the hands of the underworld" (III Tr. 67). He testified that his opinion was the result of his investigations and informant information, some of which may have been based on rumor, hearsay, and gossip (*id.* at 69). Petitioners introduced a transcript of a conversation recorded in September 1979 between a police officer and an informant (*id.* at 33) in which the informant said that Annunziato was dead. The government introduced the testimony of an FBI agent who had spoken twice with the same informant after Annunziato's disappearance and before September; once the informant said he had no knowledge of Annunziato's whereabouts and speculated that he had absconded, and on the second occasion the informant said he had just learned that Annunziato might have gone to Italy (*id.* at 43-44). A manager of a local motel documented that Annunziato had stayed in a room there on June 18 and 19, 1979 (*id.* at 47-52). A maintenance worker also saw Annunziato check into the motel on June 18 carrying a large amount of cash (*id.* at 56-58).

Petitioner Jacobs, the bondsman, also testified about Annunziato's disappearance (I Tr. 4-7). He testified that he had given bond for Annunziato on other occasions (*id.* at 6). He said that he had met with Annunziato at a restaurant on June 19, 1979, and had made an appointment to meet him on June 23 (*id.* at 4-5). Annunziato did not keep the latter appointment (*id.* at 5). Petitioner Jacobs said that in an effort to locate Annunziato he had "spent considerable time speaking to people, canvassing friends of his, friends of mine, and, also, members of the police department * * *" (*id.* at 6). He testified that he had a "feeling that something ha[d] happened to" Annunziato, and that "his friends feel that way * * *. Because I know Mr. Annunziat[o] could not exist anywhere other than his environment in New Haven" (*id.* at 6-7).

The district court granted the government's forfeiture motion (Pet. App. 9). It held that "the testimony presented by the bondsman as circumstantial evidence of the defendant's death, prior to July 9, 1979, seriously lacks the competence, or sufficiency required to excuse a criminal defendant's failure to appear" (*ibid.*). The court of appeals affirmed (*id.* at 1-3), "substantially for the reasons stated" by the district court (*id.* at 3). It noted that it had "examined both the sealed information submitted by the government to the district judge and the entire record" and concluded that the district judge had acted properly both in denying petitioners' discovery requests and in granting the government's forfeiture motion (*ibid.*). The court of appeals added: "We wish to make clear if any new evidence is uncovered which indicates that Annunziato was deceased on July 9, 1979, appellants are free to move to reopen the forfeiture proceeding without prejudice from this order" (*ibid.*).

ARGUMENT

Petitioners do not contend that the district court erred in rejecting, on the basis of the record before it, petitioners' impossibility defense. The district court's decision on this point was, in any event, not clearly erroneous; the evidence that Annunziato had been killed was highly attenuated. Instead, petitioners' principal claim is that the district court improperly denied petitioners' discovery requests.[3] But the

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[3]Petitioners also argue that there is a conflict among the circuts on whether the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure apply to a motion to forfeit bond (Pet. 10). Petitioners *urged* the district court, over the government's objection (see Government's Response to Defendant's Request for Extension of Time to File Responsive Memorandum and to Service of Interrogatories and Requests for Admissions (filed March 27, 1980)), to apply the discovery provisions of the civil rules. Petitioners recognized that the civil discovery rules were more favorable to them, in certain respects at least, than the criminal rules. The district court merely "assume[d]," "[f]or purposes of this order" (Pet. App. 6), that the civil rules applied. Thus it is

district court, in holding that the informant's privilege protected the government documents from disclosure, considered the relevant factors and struck a reasonable balance between petitioners' interest in obtaining the material and the government's interest in confidentiality. The court of appeals expressly noted that it had examined the documents in question, and it ratified the district court's decision. The correctness of this determination depends on the particular facts of this case, and further review by this Court is not warranted.

The government has a "privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Roviaro* v. *United States, supra,* 353 U.S. at 59. See also *Branzburg* v. *Hayes,* 408 U.S. 665, 697-698 (1972); *United States* v. *Ventresca,* 380 U.S. 102, 108 (1965).[4] As petitioners recognize (Pet. 14), a court deciding whether to order disclosure must "balanc[e] the public interest in protecting the flow of information against the individual's right to prepare his [case]" (*Roviaro* v. *United States, supra,* 353 U.S. at 62). Here the district court found that disclosing the

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not even clear that the courts below have taken a position on this issue; and if they have, it is the position for which petitioners argued and from which petitioners benefitted.

[4]Petitioners contend (Pet. 12-13, 15) that the district court invoked the informant's privilege sua sponte. In fact, however, government attorneys strenuously opposed petitioners' discovery requests on the ground that disclosing the information petitioners sought would jeopardize an "ongoing criminal investigation" (II Tr. 32, 34). Neither petitioners nor the court asked the government to elaborate on this reason for opposing disclosure. Moreover, as all parties knew, much of the information about Annunziato's disappearance was derived from informants. Thus it is reasonable to conclude that the court and all the parties understood that one of the government's concerns was that disclosing the information might reveal the identities of informants.

requested information would be likely to reveal the informants' identities (Pet. App. 7); thus the government's interest in confidentiality was substantial. By contrast, the information was of very limited usefulness to petitioners. The court found that it consisted mostly of contradictory hearsay and rumor (*id.* at 5-6) and did not establish that Annunziato was dead (*id.* at 5). Moreover, petitioners were not denied the opportunity to bring the information in the government's files to the judge's attention; the judge reviewed the files, and the government did not object to his considering their contents in reaching his decision on the merits (see II Tr. 34). At most, petitioners suffered only the slight injury of not being able to use the government's information for further argument and investigation.[5]

Finally, petitioners had substantial independent sources of information. They knew the identity of the informant whose recorded telephone conversation was introduced into evidence. More important, petitioner Jacobs himself apparently was well acquainted with Annunziato and had significant sources of information about Annunziato among

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[5]Petitioners contend that the government cannot raise the informant's privilege in a civil action in which it is the plaintiff because by bringing suit it automatically waives the privilege (Pet. 15-16). This contention is wholly without merit. The privilege was developed in connection with criminal prosecutions which are, of course, brought by the government (see, *e.g.*, *Roviaro, supra*, 353 U.S. at 59-62; *Scher* v. *United States*, 305 U.S. 251, 254 (1938)). In a criminal prosecution, the government's use of the privilege must be reconciled with specific constitutional protections, such as the defendant's right to compulsory process, that have no counterpart in this civil case. Moreover, petitioners' stake in this proceeding—the loss of money, without the potential "stigma[]" of a criminal conviction (see *In re Winship*, 397 U.S. 358, 363 (1970))—is substantially less than that of most, if not all, criminal defendants. Lower courts have consistently held that the informant's privilege applies in a civil action. See, *e.g.*, *In re United States*, 565 F. 2d 19, 22 (2d Cir. 1977); *Westinghouse Electric Corp.* v. *City of Burlington, Vermont*, 351 F. 2d 762, 769-770 (D.C. Cir. 1965).

his own and Annunziato's friends. This further diminished the value to petitioners of the evidence in the government's files, and it further undermines any claim by petitioners that the information they sought was "critical to [their] case" (*Branzburg* v. *Hayes, supra,* 408 U.S. at 698).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1981

DOJ-1981-05